ORIGINAL

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030; RM-8029
and	)	
Implementation of Section 309(j) of the Communications Act - Competitive Bidding 800 MHz SMR	)	PR Docket No. 93-253

CONSOLIDATED INITIAL COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC. AND SHELLY CURTTRIGHT, INC.

In accordance with the Commission's Further Notice of Proposed Rule Making in the captioned proceedings, released November 4, 1994 (hereinafter "Further Notice"), and acting through telecommunications counsel, Dru Jenkinson, Inc., Jana Green, Inc. and Shelly Curttright, Inc. (collectively hereinafter "Licensees") hereby submit their consolidated initial comments.[1/] Licensees are small, female-owned enterprises that already hold 800 MHz Specialized Mobile Radio (hereinafter "SMR") licenses, as well as pending applications for additional such licenses.

[1/] These Initial Comments are timely filed pursuant to the Commission's Order, DA 94-1326, released November 28, 1994.

I. Framework Of Pending Applications

1. Licensees generally support the Commission's initiative to implement a new framework for the licensing of wide-area 800 MHz SMR systems. But the Commission can only do so in the context of its decision to resume processing the long-pending 800 SMR MHz applications filed prior to August 9, 1994. In its News Release dated November 22, 1994, the Commission announced acceptance of the offer of assistance from an Industry Coalition to expedite the processing of these applications. Since the processing of these applications was suspended on August 9, 1994, and is now scheduled to be expedited by virtue of the assistance from the Industry Coalition, logic and equity dictate that any new wide-area licensing framework must protect the rights of those applications now pending which are capable of resulting, and will soon result, in additional granted 800 MHz SMR licenses.

2. Specifically, licenses granted pursuant to those pending applications must be given the same deference and status of an incumbent licensee and not be prejudiced by the interim delay in license processing imposed by the Commission. Thus, these licensees must be protected and permitted to continue to develop and operate these facilities under proposed Section 90.617(d) of the new rules. These licenses must be protected under proposed Section 90.663(a)(1) of the new rules. And they must be deemed to be eligible under proposed Section 90.667 of the new rules. To do otherwise would be to ignore the timing and circumstances of the filing of these applications and, effectively, apply retroactively

a new set of rules. The same comment is true with respect to proposed change to Section 90.629 of the rules (proposed Section 90.629(e)). The removal of the existing option to justify an extended implementation period should **not** be applied to licenses granted pursuant to applications filed prior to August 9, 1994. All of this is presumably the Commission's real intent, but it must be made crystal clear in the Commission's final rule. Again, to do otherwise would be legally and equitably unsustainable.

3. Further, to the extent that the pending applications are licensed, in accordance with the rules in existence at the time of filing, prior to any auctioning of the blocks of 800 MHz SMR spectrum on an MTA basis, no further provision seems necessary. Thus, any such auctions must be timed in accordance with this schedule.

4. However, if for some reason MTA-based license auctions are scheduled to occur prior to the completion of license processing for the pending applications, provisions must be made for the MTA licensees to take the "bid-for" spectrum subject to said pending applications, which are of public record and entitled to a "first-come, first-served" status and priority. Failure to make such provision for the protection of the rights associated with these pending applications will subject the entire process for "auctioning" of the MTA-based blocks of spectrum to legal challenge. Such an event, easily avoidable by appropriate provision from the Commission, would serve to further and unnecessarily hinder and delay the ability of the SMR industry to

compete with the cellular and PCS service providers on a wide-area basis.

II. Size Of MTA Spectrum Blocks And Spectrum Aggregation Limit

5. Licensees support the division of 10 MHz of SMR spectrum into four blocks of 2.5 MHz each for MTA-based licensing. The 2.5 MHz block size is appropriate in that it approximates the 42-channel threshold for frequency reuse previously considered by the Commission. In addition, this block size furthers competition by creating the opportunity to license more than one wide-area provider in each MTA.

6. Licensees agree that there should be no limit on the aggregation of 800 MHz SMR spectrum by a single licensee within a particular MTA. However, Licensees suggest that the "right of aggregation" be separated from the right simultaneously to bid successfully for all four MTA-blocks of SMR spectrum. Some protection needs to be afforded to small or minority-owned businesses to permit them to successfully compete in the bidding process. This is especially true if the Commission does not intend to disqualify MTA licensees from also bidding on the 80 so-called "lower" channels. To that end, Licensees urge that one 2.5 MHz block be set aside as an "entrepreneurs' block" as the FCC has done in PCS. Licensees dispute the Commission's conclusion that this approach is impossible. The PCS spectrum is already populated by

microwave users and the Commission is segregating two "entrepreneurs' blocks" therein.[2/]

7. Furthermore, the opportunity to bid for and aggregate 800 MHz spectrum should not effectively be limited to the class of existing SMR licensees with the deepest pockets. The recent industry consolidation of the largest SMR service providers supports an approach of promoting and channelling new entrants into the industry to foster competition. The allocation of four blocks of SMR spectrum in each MTA creates new business opportunities for new service providers, including women and minority-owned enterprises.[3/] If the Commission's licensing process were to slant only toward existing SMR licensees, the Commission unquestionably would be restricting competition in the industry. At present, for example, Nextel, Inc., by virtue of acquisition and merger, has established a near-monopoly position in holding SMR licenses in the majority of all major MTAs. The remaining SMR licensees are primarily smaller companies which lack the financial capability successfully to challenge Nextel in the MTA bidding process. Expecting smaller enterprises to bid against the Nextel's of the marketplace would be a *de facto* grant of all of the four blocks in many MTA's to such large enterprises. The interest of the public is best served by fostering rather than limiting competition in the

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[2/] If the Commission eschews such an approach, all 80 "lower" channels should be established as an entrepreneur block(s).

[3/] Licensees also favor the lifting of the ban on wireline telephone companies in the SMR business.

bidding process. The Chairman of the Commission himself has publicly and repeatedly said so on a number of occasions in recent months.

III. Licensing Of Non-Contiguous Local Channels

8. Licensees urge that future licensing on the "lower 80" channels be on an area-specific basis, rather than a site-specific basis. Uniformity and efficiency of administration suggest that these "lower 80" channels also be licensed on the same MTA-area basis as the four 2.5 MHz blocks. However, if the Commission is concerned about providing a more local service area, Basic Trading Areas ("BTA") could be employed. The "5 channel" block is an appropriate grouping which would permit limited service application on a local basis, yet provide flexibility for system modification within the designated area. Further, the area-licensing approach permits more efficient service area coverage than site-specific authorizations and provides a vehicle for industry consolidation without coverage gaps in the "lower 80" channels.

IV. Rights And Obligations Of MTA Licensees

9. Operational Flexibility - Licensees support the Commission's belief that SMR licensees be extended the same operational flexibility in their service area as might be experienced by cellular and PCS licensees. However, the potential for interference is greater in SMR since incumbent co-channel licensees will exist within the same service area as the MTA licensee. The Commission proposes that MTA licensees be allowed to "self-coordinate" system modifications within their service area

without need for prior Commission consent, provided they notify the Commission of the coordinates and certify compliance with co-channel interference protection. Licensees agree with the Commission's proposal, but believe that incumbent co-channel licensees must receive similar notice and certification of compliance. Such prior notice and certification of compliance provide incumbent co-channel licensees with an awareness of the intentions of the MTA licensees and the opportunity to review the proposals for resulting potential interference. By merely adding incumbent co-channel licensees to the list for notification and certification, this requirement adds no additional burden to the MTA licensee and seeks to assure that all interested parties are fully aware in advance of matters affecting their respective service areas.

10. Treatment of Incumbent Systems - Licensees support the Commission's preference to allow MTA licensees and incumbents to negotiate relocation, frequency swaps, mergers, purchases, or other arrangements on a voluntary basis. The marketplace forces are the most efficient mechanism available to the SMR industry. The 800 MHz SMR industry is mature in the sense of frequency licensing. Fully comparable alternative frequencies are unavailable in the 800 MHz band. Lacking this essential alternative, mandatory relocation is not a viable concept under any circumstances. The Commission's resources are better dedicated to administration rather than arbitration. The marketplace forces proven to be efficient in other wireless industries remain available to serve the SMR

industry equally well. The presumption included by the Commission in proposed Section 90.667 will save scarce agency resources in assessing the details of each transaction. As noted above, however, the Commission must clarify that this mechanism applies to licenses granted pursuant to applications pending as of August 9, 1994.

11. Co-Channel Interference Protection Incumbent SMR Systems - Licensees support the Commission's conclusion that wide-area licensees would continue to be subject to existing station-specific interference criteria with respect to all incumbent co-channel stations as provided by proposed rule Section 90.663(a)(1). Imposing such compliance on MTA licensees does not unreasonably hamper their ability to fully construct their systems. As noted above, the 800 MHz SMR industry is mature in the sense of frequency licensing. Accordingly, the protection afforded by this proposed Section for incumbent co-channel stations must be adopted. When the potential MTA licensee makes its decision to bid for a certain spectrum block, the potential MTA licensee should be fully aware of the presence of incumbent licensees. As the Commission has recommended, the MTA licensee would have the right to make arrangements on a voluntarily basis with the incumbent licensees. As noted above, however, the Commission must clarify that this mechanism applies to licenses granted pursuant to applications pending as of August 9, 1994.

12. Licensees also support the Commission's recommendation to adopt a protected service area for incumbent systems. The

Commission should allow the incumbent licensee to construct new base stations within the fixed-radius (e.g., 30 km) of its originally authorized station provided that the 40 dBu signal strength contour of the existing station would not be extended by the new base stations. This definition provides some flexibility to the incumbent licensee with regard to new base stations within the protected service area while simultaneously protecting the MTA licensee by constraining the incumbent licensee to the existing 40 dBu signal strength contour of the licensed station. Again, this opportunity must be afforded to incumbent licensees resulting from the Commission's actions on applications pending as of August 9, 1994.

V. Construction Requirements

13. Under specified circumstances, extended implementation under Section 90.629 or a waiver of the Commission's rules on the "lower 80" channels must continue to be permitted. Licensees agree that protection against spectrum warehousing is important. The proposed rules now segregate the "lower 80" channels from the "upper 200" channels for prospective licensing and regulation. However, situations exist where a licensee will have channels in the "lower 80" group and the "upper 200" group in the same system. In addition, situations exist where a potential wide-area provider may have 5-channel licenses in both the "lower 80" channels and the "upper 200" channels which comprise a local or regional network system. In these situations, it is unreasonable simultaneously to regulate these licenses under two different sets of implementation

rules. Accordingly, Licensees respectfully suggest that in these specific situations extended implementation under Section 90.629 or a waiver of the Commission's rules on the "lower 80" channels must continue to be permitted. And, as noted above, whatever the Commission does prospectively, these options must specifically continue to be available with respect to licenses granted pursuant to applications pending as of August 9, 1994.

14. Since the Commission has tentatively concluded that MTA licensees should have five years to construct their systems, existing and potential wide-area SMR licensees should be permitted equal treatment in the form of extended implementation periods up to five years. To provide disparate treatment between existing and potential wide-area licensees and MTA licensees operates to force a wide-area licensee to become an MTA licensee for the sole purpose of being treated equitably. The interests of the public and the industry are both presently protected under Section 90.629. Under that rule, extended implementation is presently conditioned upon the licensee constructing and placing its system in operation within the authorized implementation period of up to five years. As sufficient safeguards and performance criteria are already present, no apparent interest of the public is served by disparately treating an existing or potential wide-area SMR licensee who happens not to be a MTA licensee. Certainly, if the Commission adopts an area licensing scheme for the "lower 80" channels, there is no basis for any distinction.

VI. Competitive Bidding Issues

15. As noted previously, Licensees believe that in formulating competitive bidding procedures the Commission must be mindful of the Budget Act admonitions regarding competitive opportunities for all, particularly small and woman-owned enterprises. On that score, the Commission itself already has concluded that there is "a severe underrepresentation of women and minorities in telecommunications." Further Notice at pp. 44-45, para. 91. That must be a paramount factor as the Commission finally shapes these 800 MHz SMR wide-area licensing rules.

16. As to specific competitive bidding issues raised by the Further Notice, Licensees believe that licensing "lower 80" SMR channels on a site-specific basis is inefficient and confusing. As noted above, Licensees believe the Commission should employ, at a minimum, BTAs. Of course, incumbent licensees on these channels would have to receive the same protections as incumbents on MTA frequencies.

17. Upfront payments for 800 MHz SMR auctions should be structured so as not to limit bidders solely to those with the deepest pockets. Using a $0.02 MHz per pop formula may have that effect. On the other hand, a $2,500 upfront payment is too low and may be an invitation to pure speculators.

18. Designated entities should receive the full panoply of preferences employed by the Commission in competitive bidding for other wireless services (e.g., PCS). These should include (a) reduced upfront and down payments (b) bidder's credits of up to 40

percent for woman and minority-owned businesses (c) tax certificates and (d) installment payments with favorable financing terms for small businesses. Eligibility rules for woman and minority-owned businesses should track those developed for broadband PCS.[4/] However, small business eligibility should, as the Commission observes, be set at a lower level than PCS. Licensees suggest the traditional $6 million/$2 million formula employed by the Small Business Administration and adopted by the Commission in the context of Interactive Video and Data Services licensing.

19. Finally, as noted above, if the Commission is truly interested in ensuring successful participation by designated entities, it should adopt an "entrepreneurs' block" set aside for one of the MTA-based licenses, as well as in the "lower 80" channels. Where there is a regulatory will, there is a way.

Respectfully submitted,

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By: _____

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Date: January 5, 1995

[4/] There should be no difference between the MTA and 80 "lower" channels, especially if the latter are licensed on an area-specific (e.g., BTA) basis.

CERTIFICATE OF SERVICE

I, Lisa Y. Taylor, a secretary in the law firm of Besozzi Gavin & Craven do hereby certify that a copy of the foregoing **"COMMENTS OF DRU JENKINSON, INC., JANA GREEN, INC. AND SHELLY CURTTRIGHT, INC."** has been sent via hand delivery on this 5th day of January 1995, to the following:

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